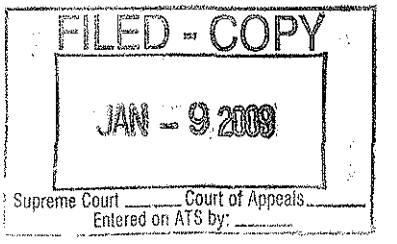
1-9-2009

Nelson v. Big Lost River Irrigation Appellant's Brief Dckt. 35543

IN THE SUPREME COURT OF THE STATE OF IDAHO

* * * * * * * * * * *

DAVID NELSON and LOY PEHRSON, et al, Plaintiffs-Counterdefendants-Appellants, v. BIG LOST RIVER IRRIGATION DISTRICT; Board of Directors, RICHARD REYNOLDS, CHARLIE HUGGINS, KENT HARWOOD, JOEL ANDERSON, M. MARX HINTZE, IDAHO DEPARTMENT OF WATER RESOURCES, and DAVID R. TUTHILL, JR., Director, Defendants-Counterclaimants-Crossdefendants-Respondents. and ROBERT WADDOUPS, et al, JAY F. PEARSON, et al, Intervenors-Counterclaimants-Crossclaimants-Respondents.	Supreme Court Docket #35543-2008 (Custer County Case #CV 2005-91)



APPELLANT'S BRIEF

* * * * * * * * * * *

APPEAL FROM THE DISTRICT COURT OF THE 7th JUDICIAL DISTRICT FOR CUSTER COUNTY
HONORABLE JON J. SHINDURLING, DISTRICT JUDGE, PRESIDING

* * * * * * * * * * *

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STATEMENT OF THE CASE

I. Nature of the Case.

Appellants, all 63 of them, are consumers of water that Respondent Big Lost River Irrigation District (hereinafter "District") holds in trust for each of them, based on a judicial apportionment in 1936. Each consumer was apportioned a specific volume of water, as measured in the Mackay Dam. This water is delivered from the Mackay Dam to the consumers' various headgates and canals by transporting it down the natural channel of the Big Lost River. Many stretches or "reaches" of the river have significant conveyance loss, or what is referred to here as "shrink", as the river runs downstream more than 25 miles from Mackay to Arco, with the percentage of shrink generally increasing further downstream.

Appellants are referred to here as the Mackay Users to distinguish them from the Intervenors, who are referred to as the Arco Users. The Mackay Users divert water from the natural river channel above what is known as the Blaine Diversion, a canal where the District historically diverted all water from the river channel.

The appeal of this declaratory judgment action arises from the fact that the district court declared the District has discretion to charge conveyance loss

against the apportioned water of the Mackay Users, even for conveyance losses that occur downstream from, and are not related to, the delivery of their water.

Appellants maintain the district court erred because the District's power is limited by both the 1936 decree *apportioning* water and by a 1994 Rule implemented by IDWR prescribing that conveyance losses in the natural channel be apportioned only to those whose water passes through a particular stretch, or reach, of the river.

In sum, Appellants ask this Court to declare that the District's discretion to distribute water is limited and circumscribed by the 1936 decree, by the 1994 Rule, and by equity. In other words, it is an abuse of discretion to charge a Mackay User's apportioned amount of water for conveyance loss occurring near Arco. Yet, the District has attempted to do this under the appellation of "universal shrink", as it did both in 1994, which led to the 1994 Rule, and again beginning in 2005, which gave rise to the instant case.

Appellants respectfully submit the decisions below are based on an erroneous understanding of the law, namely: (1) a misconception that the District had a statutory discretion to ignore IDWR's Rules requiring an accounting and application of conveyance loss by river reach; (2) a misconception that

the District has discretion to ignore and undercut the 1936 judicial decree, which is *res judicata*, and which apportions the water "as measured in the reservoir" to each tract of land; and, (3) a failure to understand "universal shrink" is contrary to law because it takes a fixed, judicial apportionment of water from one consumer and gives it to another further downriver.[1]

II. Course of Proceedings Below.

The Mackay Users initiated this case against the District seeking to have the court declare the River-by-Reach Rule applicable and have the universal shrink scheme invalidated. The court initially granted a preliminary injunction holding the Rule was clear and required conveyance losses to be allocated on a reach-by-reach basis. R. p. 28-33. The Arco Users intervened and a series of amended complaints followed, including to join IDWR as a party because its Rules were involved. R. p. 74-93. The District counterclaimed for a declaration that the universal shrink scheme was lawful and within the discretion of the District. R. p. 94-100.

Cross-motions for summary judgment were filed. On November 17, 2006, the court issued its *Opinion, Decision, and Order on Defendant Big Lost River*

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1 The actual practice through which this is accomplished appears to be to charge, or deduct, from the consumer's apportioned amount, an amount reflecting a portion of total conveyance losses in the entire river, instead of just the *portion used to get water to the consumer's diversion from the river.* In other words, instead of charging by river segment or reaches, as IDWR's rules require, Mackay Users are charged based on all losses in the entire length of the river.

Irrigation District's Motion for Summary Judgment and Plaintiffs' Cross-Motion for Summary Judgment. R. p. 145-158. The court held that IDWR's River-by-Reach Rule (Rule 40.03) requires the watermaster to charge conveyance loss against storage water to administer the natural flow in the River, but the District still has unfettered discretion to manage conveyance loss amongst its consumers under discretion allocated through Idaho Code §43-304. In short, the court held that, while IDWR has authority under Idaho Code §42-603 to promulgate rules regarding water in the natural channel, that the statute conflicted with the discretion to distribute water among consumers given to the District by Idaho Code §43-304. R. p. 156. The court resolved what it considered to be a conflict in these statutes by holding that IDWR has jurisdiction of water in the river channel until it is delivered to the storage water to the Irrigation Districts "headgate", but that the District had authority for water distribution from that point. Id. In sum, the court held the District had discretion to administer water as between its consumers. R. p. 156-157.

The Mackay Users moved for reconsideration (R. p. 159-161), but the court reconfirmed its prior holding by order dated March 23, 2007. R. P. 177-183.

The Mackay Users instituted an appeal to this Court. R. p. 186-187. After they hired new counsel, the parties stipulated to the dismissal of that appeal because it was interlocutory and had not been properly certified under I.R.C.P. 54 (b), as the District's claim that it be allowed to implement universal shrink had not been decided.

After remand, on February 20, 2008, the court entered another *Order, Judgment, and Decree*, based on a stipulation of the District and Intervenors (but not the Mackay Users), requiring that "universal shrink" be used to allocate river losses of storage water among the District consumers. RII. p. 7-13.

The Mackay Users responded with motions to enlarge time and for reconsideration of each of the court's orders, pointing out that the district court had not considered several important laws, including: I.C. §42- 801 which requires IDWR to track storage water put into and taken out of the river on a person-by-person basis; I.C. §43-1503 which specifies there can be no conflict in the law, as the court had previously ruled, because the irrigation district laws of Title 43 (including I.C. §43-304) shall not be construed " . . . as repealing or in any way modifying the provisions of any other act relating to the subject of irrigation water or water distribution". [2] RII. p. 14-21, 145-160.

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2 It is important to note each of the statutes mentioned were in effect in substantially the same form before the 1936 judicial apportionment. Thus when water was apportioned in the reservoir, it was clearly understood the conveyance losses would be accounted for according to these statutes.

On June 8, 2008, the court heard argument on Plaintiffs' motion for reconsideration and the other parties' objections regarding timeliness. It ruled that it did have discretion to reconsider and denied the timeliness objections. Tr. p. 374, ln. 20 - p. 375, ln. 2. It denied reconsideration because it did not believe the 1936 decree addressed conveyance loss and it believed the District had the power to change its mind with respect to how shrink was allocated, even though distribution on a reach basis had occurred for a long time. Tr. p. 377, ln. 6 - p. 379, ln. 21.

This appeal timely followed that decision.

III. Statement of Facts.

A. In 1935 and 1936, an amount of water, measured in the reservoir, was judicially apportioned to each individual user.

The 1936 Findings of Fact and Conclusions of Law provide the following:

The Findings state:

> ... in order to prevent an inequitable distribution to the land ... [the Board] found, determined and declared certain factors and consideration to be an integral part of said ... apportionment of benefits and to be basic and binding regulations which would govern distribution of water ... and this Court does find, determine and declare as follows:
>
> That the following factors and considerations are hereby found, determined, and declared to be an integral part of said apportionment and assessment of benefits, to-wit:-

... this Court does find and determine that certain [lands] require ... a supplemental storage water right ... from the reservoir and irrigation works proposed to be acquired ... as shown in the following table:

Supplemental Requirement in Acre Feet Measured in Reservoir

Decreed Priority	*Supplemental Requirement* In Acre Feet Measured in Reservoir
Before June, 1884	None
June, 1884	.46
July, 1884	.59
August, 1884	.64
September, 884	.65
October, 1884	.81
June, 1885	1.04
After June, 1885	1.17
Year 1886	1.35
Year 1887	1.51
Year 1888	1.54
Year 1889	1.59
Year 1890	1.63
Year 1891	1.63
Year 1892	1.65
Year 1893	1.65
Year 1894	1.68
Year 1895	1.73
Year 1896	1.73
Year 1897	1.76
Year 1898	1.77
Year 1899	1.77
Year 1900 and Subsequent Years	1.79

RII. p. 51.

Thus, it is clear the voters, the Board and the Court all knew, considered and decided to address "inequitable distribution" as "an integral part" of the decree, and decided, rightly or wrongly, the solution was to apportion and measure in the reservoir:

> [the Big Lost River Irrigation District] ... Board of Directors in order to prevent an inequitable distribution to the lands within the district of the supplemental water ... found, determined, and declared certain factors and considerations to be an integral part of said assessment and apportionment of benefits and to be basic and binding regulations which would govern the distribution of water so acquired. ... and this Court does find, determine and declare as follows:-
>
> That ... this Court does find from a study of the records of the flows of The Big Lost River and its tributaries ... [on an average year the reservoir yields storage not of less than] 24,500 acre feet storage measured in said reservoir, and that those lands within said district to which have been apportioned certain benefits designated "Amount Storage Water Assessment" are benefited by the allotment of storage water ...
>
> It is hereby further found and determined by this Court that storage water is hereby allotted to those lands against which "Storage Water Assessment" benefits have been apportioned according to said list and apportionment of benefits, and only such lands shall be entitled to storage water.

RII. p. 51-52.

* * *

> And in any year when the water supply belonging to the district and available for storage shall be more or less than the 24,500 acre feet, then the respective landowners entitled to storage

> water shall be entitled to the available stored waters on the same basis and in the same proportion as shown to be a supplemental requirement in acre feet for the several classes of land according to the above table.

Later in the conclusions (RII. p. 65-68) (Exhibit A, XI, pp. 36, 39), the court concluded that the petitioners were entitled to a judgment and decree of the court ratifying and approving and confirming the proceedings taken by the Board and:

> ... all proceedings in connection with the assessment and apportionment of benefits by reason of carrying out of such plan ... a copy of the list of said assessment and apportionment of benefits being on file herein marked "Petitioners' Exhibit 13".

In the last paragraph of the Findings and Conclusions, any doubt about the finality of the proceedings is extinguished by the court's determination:

> . . . and all proceedings had and taken by said District as set forth and described in petitioners' petition on file herein, as legal, valid and binding upon said District and upon all the lands included therein and affected thereby. ... Let judgment and decree be entered accordingly. Dated this 25th day of January, 1936.

RII. p. 69. (Exhibit A, p. 40)

Those findings and conclusions resulted in Exhibit B, the Judgment and Decree of the same date. RII. p. 70-84. It confirms the apportionment to each consumer. It, in Section VI (page 10), acknowledged the prior proceedings, the apportionments of benefits, and assessments and notes that they were all

duly accomplished "in the proper manner and order and in full and strict compliance with the statutes and laws of the State of Idaho applicable thereto, they are hereby ratified, approved and confirmed." RII. p. 79-80.

In Section IX (page 11-12), the court determined that the respective amounts of apportionment for the various tracts and subdivisions of lands, including the special factors and considerations entering into the apportionment and the basic rules and regulations governing the use and distribution of water upon those lands, are "hereby ratified, approved and confirmed." *RII.* p. 81.

And in the final section, Section XIII (p. 13), the court adjudicates each and every act in the proceedings with respect to the things described in Petitioners' Petition to be lawfully and properly accomplished, and to be "valid and binding upon said District and all lands included therein and affected thereby; and each and every of the said acts and proceedings are hereby ratified, approved and confirmed". RII. p. 83.

B. In 1994, through a process of negotiated rulemaking in which the District participated, IDWR adopted a Rule for administering water that required water losses in the river channel below the Mackay Dam be accounted for on a reach-by-reach basis and rejected *the concept of "universal shrink"*.

During the early stages of the Snake River Basin Adjudication, the Big Lost River Valley was selected as one of the "test basins" because significant issues

had arisen concerning water rights and how to administer the reservoir. R. p. 142. Consequently, pursuant to the SRBA Court orders an interim administration, David Shaw, Bureau Chief for IDWR, implemented negotiated rulemaking which the District attended and participated in. Id. Rule 40.03.b (IDAPA 37.03.12.40.03.b). Id. The Rule was adopted to preserve what the participants all considered the equitable distribution of storage water in Water District 34. This was done in part to specifically address the concerns of individual water right holders about how delivery losses would be applied to storage water. Id. It was intended to insure the storage water would not be subject to universal shrink, but would be allocated on the shrink-by-reach formula set forth in the Rule. Id.

The final Rule reads as follows:

> Conveyance losses in the natural channel shall be proportioned by the watermaster between natural flow and impounded water. The proportioning shall be done on a river reach basis. Impounded water flowing through a river reach that does not have a conveyance loss will not be assessed a loss for that reach. The impounded water flowing through any river reach that does have a conveyance loss will be assessed and a proportionate share of the loss for each losing reach through which the impounded river flows. To avoid an iterative accounting procedure, impounded water conveyance loss from the previous day shall be assessed on the current day.

This Rule, which is consistent with the 1936 decree and the admitted

historic practice effectively resolved the disputes until the District made another attempt at implementing universal shrink in 2005.

C. The Big Lost River Irrigation District adopted bylaws and policies, as late as 2004, confirming each individual user has the right to apportioned water under the 1936 decree.

The current version of the District's own Bylaws provides as follows:

> Sec. 5. Any water consumer who has any water right under the Assessment and Apportionment of Benefits under the District's bond issue voted May 18, 1935, and approved and confirmed by the District Court of the Sixth Judicial District of the State of Idaho in and for the County of Custer, on January 6, 1936, and thereafter approved by Reconstruction Finance Corporation, shall have the right to any water belonging to him by such storage right or direct flow under said Assessment and Apportionment of Benefits, in the District's Reservoir, [but such water consumer shall be required first to give forty-eight (48) hours notice to the general manager of the district or to the office of the district of his intention to store said water, and such water consumer shall likewise give forty-eight (48) hours notice to the general manager or to the office of the district of his desire again to use water]. (This paragraph was deleted from bylaws June 2, 1964.) (Emphasis added.)
>
> * * *
>
> Sec. 7. The Board of Directors shall have power to reduce the quantity of storage water demanded by any consumer in case of a shortage in the Mackay Reservoir, or by reason of breakage in the banks of canals, headgates or dams, whereupon it shall be the duty of the Board of Directors to apportion the water available pro rata among all consumers.

RII. p. 99. (Exhibit C, Article VII, p.12.)

The District has argued that the first paragraph above was deleted, but Appellants maintain only the bracketed portion was, as is consistent with all of the other deletions through the Bylaws.

D. "Universal shrink", the central issue in this case, is an accounting method that effectively reapportions water to annul the amount judicially apportioned to each individual user.

There is no dispute about what "universal shrink" is. But for the sake of clarity it is important that the Court understand not only what it is, but what it is not. First, universal shrink only applies to water being transported from the *reservoir through the natural river channel of the Big Lost River.* Once judicially apportioned storage water is diverted from the natural river channel into canals and ditches, it falls outside the universal shrink scheme. The District admits that, once water is diverted into a canal, conveyance losses from the canal are charged only to those who use water from the canal.

Second, it is important to understand that the universal shrink scheme applies only to the apportioned storage water. Those who have water rights diverted directly from the river, and not through storage, are not charged a conveyance loss in the channel below the reservoir. This is obviously because *they are entitled to have their water diverted from the river at their point of* diversion, without regard to conveyance losses because such losses do not

come into play with respect to those natural flow rights until they are diverted out of the river. Thus, to suggest the river-by-reach formula is designed to apply to flow rights and not to storage rights ignores the fundamental attributes of the flow rights. As is argued below, the universal shrink scheme is nothing more than an attempt to "reapportion" the storage water in a manner inconsistent with the judicial apportionment in the reservoir.

Finally, it is also undisputed the Mackay Users lose part of their apportioned water when the universal shrink scheme is implemented, contrary to their constitutional right to use water that has been dedicated to their land. See R. p. 87 (Exhibit B to the 2nd amended complaint), showing the actual shrink under the river-by-reach accounting versus the universal shrink accounting.

ISSUES PRESENTED ON APPEAL

I. Did the district court err in holding that the Big Lost River Irrigation District has unfettered discretion to distribute apportioned water below the Mackay Dam without regard to the 1936 judicial apportionment?

II. Did the district court further err by judicially decreeing that the universal shrink scheme, which causes individual users to lose apportioned water so that other users can benefit, is lawful and to be applied without reference to limitations in the 1936 decree and the 1994 Rule?

ATTORNEY FEES ON APPEAL

Appellants Nelson, et al., request costs and attorney fees on appeal under I.A.R. 40 and 41 and I.C. §12-117. The costs should be awarded as a matter of right under the Appellate Rules. The attorney fees should be awarded under I.C. §12-117 against the District because it acted without reasonable basis in fact or law by intentionally and erroneously designing a scheme to deprive the Mackay Users, people to whom it owes a duty as trustee, of water judicially apportioned to them and constitutionally protected through the dedication of that water to their properties.

STANDARD OF REVIEW

In reviewing the summary judgment motions this Court employs the same standard used by the district court. *Sprinkler irrigation Co., Inc. v. John Deere Ins. Co., Inc.*, 139 Idaho 691, 695, 85 P.3d 667, 671 (2004). Judgment is appropriate only if the pleadings, depositions, admissions, affidavits and other materials on file show no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c).

ARGUMENT

The Court erred in holding the District has unfettered discretion to ignore the *previous judicial allocation* of benefits, including the apportionment of water.

To properly analyze the claims in this case, one must first recognize the legal standards that circumscribe the discretion statutorily allocated to the courts and to an irrigation district. When dealing with matters of discretion, the court must decide: (1) what legal discretion the district has; (2) whether the district has acted within the outer bounds of that discretion and consistent with legal standards; and, (3) whether the district's decision to seek and obtain a judicial decree mandating "universal shrink" falls within the district's discretion and exercise of reason. *See, Sun Valley Shopping Center, Inc. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991).

In this case, the analysis begins with acknowledgment the District has some discretion to distribute water pursuant to I.C. §43-304. However, Appellants contend the District acted beyond the bounds of that discretion by ignoring the 1936 decree, by attempting to circumvent the conveyance loss rule, and by failing to exercise a reasonable and equitable distribution plan.

I. Irrigation District Law limits the District's power by compelling it to abide by the 1936 decree.

Irrigation districts are creatures of statute. Their quasi-public corporate status confers on them only such powers as given by statute or necessarily

implied therefrom. *Yaden v. Gem Irrigation District*, 37 Idaho 300, 216 P. 250 (1923). The power of directors and officers is limited by the express and implied provisions of statutes, and any actions in excess of the statutory provisions are *ultra vires*. *Lewiston Orchards Irrigation District v. Gilmore*, 53 Idaho 377, 23 P.2d 720 (1933).

To date, neither the lower court nor the parties have considered the express, statutory limitations that follow from the declaration that the use of water is a public use to be regulated and controlled in the manner prescribed by law. *Nampa and Meridian Irr. Dist. v. Barclay*, 47 P.2d, 916, 921 (Idaho, 1935). (The consumers have rights as distributees of the water under Sections 4 and 5, Art. 15, of the Constitution.)

Furthermore, to avoid arbitrary or capricious exercise of an irrigation district's powers under I.C. §43-406, the benefits each landholder will receive, and the corresponding assessments he will pay, must be fixed by judicial decree when bonding is approved. I.C. §43-406.

When a district is created and when it uses bonds to acquire its water rights and works, a court must decide and decree what benefits and what costs in proportion to those specific benefits will be apportioned equitably to each of the parcels of land which will receive the water. This process is spelled

out in Title 43, Chapter 4, beginning with the election to authorize issuance of bonds and the Board initially apportioning costs and benefits. I.C. §43-404. The Board must then hold hearings to apportion the benefits to the tracts of land and determine whether benefits and assessments will be just and equitable. I.C. §43-405. Then, a district court must confirm the assessments and apportionments are just and equitable. I.C. §43-406.

The decree of confirmation fixes the apportionment and is conclusive as to all matters considered in the proceedings. *American Falls Reservoir District v. Thrall*, 39 Idaho 105, 130, 228 P. 236 (1924). By specific statutory prohibition, any reopening of the case "shall not be considered as authorizing any rehearing of the matter theretofore heard and decided". I.C. §43-406.

It is significant to protecting a consumer's rights that a court, and not the board, is assigned the duty of ratifying, approving and confirming the assessments, lists, apportionments and distributions. If the court finds any matter unjust or erroneous, "the same [petition] shall not be returned to said board, but the court shall proceed to correct the same so as to conform to this title and the rights of all parties in the premises ... " I.C. §43-408. Under this provision, the confirming court clearly has the power to make adjustments to any apportionment of benefits and does not act merely in the capacity of a rubber

stamp. *Haga v. Nampa & Meridian Irrigation District*, 38 Idaho 333, 221 P. 147 (1923). This judicial determination is *res judicata* and cannot be collaterally attacked. *Knowles v. New Sweden Irrigation Dist.*, 16 Idaho 217, 101 P. 81 (1908); *Smith v. Progressive Irrigation District*, 28 Idaho 812, 156 P. 1133 (1916); see also, *Russell v. Irish*, 20 Idaho 194, 118 P. 501 (1911).

In short, from before Idaho became a state until the present, Idaho has statutorily mandated that a landholder's proportion of benefits and costs be equitably fixed by a court at the time a district is being created or bonds issue. Furthermore, once fixed by judicial adjudication, a district has no discretion to change them.

To bond the lands of the settlers within a district to acquire the right to the use of water and then to deprive them of such right in order that it may be furnished to lands without the district would clearly be taking property of the landowners within the district without due process of law. *Yaden v. Gem Irrigation District*, 37 Idaho 300, 309 (1923). To circumvent the apportionment that was fixed during the 1936 bonding process through universal shrink has the same affect. It takes an apportionment of water to give it to others within a district.

In this case, the benefits were adjudicated in 1936 and specifically

apportioned so that each user's benefit would be a volume of water "measured in the reservoir".

The Findings state:

> ... in order to prevent an inequitable distribution to the land ... [the Board] found, determined and declared certain factors and consideration to be an integral part of said ... apportionment of benefits and to be basic and binding regulations which would govern distribution of water ... and this Court does find, determine and declare as follows:
>
> That the following factors and considerations are hereby found, determined, and declared to be an integral part of said apportionment and assessment of benefits, to-wit:-
>
> ... this Court does find and determine that certain [lands] require ... a supplemental storage water right ... from the reservoir and irrigation works proposed to be acquired ... as shown in the following table:

Supplemental Requirement in Acre Feet Measured in Reservoir

Decreed Priority	Supplemental Requirement In Acre Feet Measured in Reservoir
Before June,1884	None
June, 1884	.46
July, 1884	.59
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September, 884	.65
October, 1884	.81
June, 1885	1.04
After June, 1885	1.17
Year 1886	1.35
Year 1887	1.51
Year 1888	1.54

Year 1889	1.59
Year 1890	1.63
Year 1891	1.63
Year 1892	1.65
Year 1893	1.65
Year 1894	1.68
Year 1895	1.73
Year 1896	1.73
Year 1897	1.76
Year 1898	1.77
Year 1899	1.77
Year 1900 and Subsequent Years	1.79

Thus, it is clear that in 1936 the voters, the Board, and the Court all knew, considered and decided to address "inequitable distribution" as "an integral part" of the decree, and decided, rightly or wrongly, the solution was to apportion and measure in the Reservoir. Now the District wants to measure at the headgates, numerous miles below the Reservoir. They label this "universal shrink," this scheme of effectively forcing Mackay Users to give water apportioned to them to the Arco Users for conveyance losses downstream of the Mackay Users.

The label does not change the fact that universal shrink is nothing more than a reapportionment. A reapportionment contrary to the doctrine of *res judicata* and the clause in I.C. §43-406 that provides no matter considered in the initial case apportioning benefits may be reheard. *American Falls Reservoir*

District v. Thrall, 39 Idaho 130, 228 Pac. 2236 (1924). (The decree that confirms and fixes the apportionment of benefits is conclusive as to all matters considered in the proceedings).

Neither the Intervenors, the District, nor the Court, has the power or discretion to "equitably reapportion."

ii. The District Court's Summary Judgment Order Fails to Construe the Statutes in *Pari Materia*.

The Court may not enter an illegal order, denying Appellants the benefits previously apportioned to them per court decree. Nor can the lower court's order withstand scrutiny when all of the pertinent statutes are considered.

A. This lower court's ruling erroneously concludes and effectively holds the District has "jurisdiction" to reapportion.

The district court has decided, when IDWR promulgated the rules, the rules were directed to apply only to the watermaster under authority from I.C. §42-603, and not to the District. However, Appellants submit the district court did not dig deep enough in the statutes when it stated, under I.C. §43-304, the Board has authority and discretion to allocate water in the river below the dam. Contrary to this ruling, the statutes specify there can be no "conflict" between IDWR's jurisdiction to administer by rule and the District's jurisdiction to allocate water amongst its users under Title 43. The duties over water within the river

channel, or what the rules refer to as "reaches," is assigned to IDWR. I.C. §42-801. (A reservoir owner must give IDWR an accounting of the specific amount being discharged into the river and the persons and ditches to whom it will be conveyed.)

Furthermore, the function assigned to IDWR does not conflict in any way with the District's statutory powers. In fact, the statutory scheme states IDWR's authority to administer the reaches is not in any way diminished by irrigation district law, i.e., Title 43.

I.C. §43-1503 specifically provides:

> None of the provisions of this title [43] shall be construed as repealing or in *anywise modifying the provisions of any other act relating to the subject of the irrigation or water distribution.* Nothing herein contained shall be deemed to authorize any person or persons to divert the waters of any river, creek, stream, canal or ditch from its channel, to the detriment of any person or persons having any interest in such river, creek, stream, canal or ditch, or the water therein, unless previous compensation be ascertained and paid therefor, under the laws of this state authorizing the taking of private property for public uses.

B. The Practice Of Universal Shrink Is Contrary To The Apportionment Of Water, As Measured In The Reservoir, IDWR's Duty to Administer, and the "River by Reaches" Rule.

Using an example helps to illustrate how the universal shrink concept of water distribution is contrary to the apportionment of benefits, other laws and Rule 40. In this example, Mr. Mackay and Mr. Arco are persons owning land to

which the benefits were apportioned, as measured in the reservoir, in 1936. Mr. Mackay's land is slightly below the reservoir on the first "river reach". Mr. Arco's land is 20 miles below the reservoir, closer to the town of Arco.

Mr. Mackay and Mr. Arco were each apportioned 10 acre feet, as measured in the reservoir. When Mr. Mackay's 10 acre feet are delivered, one acre foot is lost through conveyance in the river below the reservoir. When Mr. Arco's 10 acre feet are delivered, 5 acre feet are lost in conveyance in the river below the reservoir.

If universal shrink is applied, Mr. Mackay would not receive 9 acre feet at his headgate when he calls for his 10 acre feet of water. Instead, if Mr. Arco and Mr. Mackay are each calling for their 10 acre feet of water, Mr. Mackay would only realize 7 acre feet instead of 9. (20 acre feet less total conveyance loss of six acre feet, divided by two equals three acre feet of loss apportioned to Mr. Mackay).

Such a scheme is contrary to law and takes Mr. Mackay's rights that have been fixed since 1936, by vote, petition, decree and now IDWR's Rule.

CONCLUSION

This Court must effectuate prior decrees and reject the opponent's attempts to reapportion rights under some ill-defined notions of equity, called universal shrink.

In sum, while a district has some discretion to equitably distribute water among its consumers, the District's discretion is limited to distribution by the judicially fixed parameters established when the District purchased the system through bonding. Neither the District nor this Court may ignore those parameters. In this case, the parameters have been disregarded, both in terms of IDWR's unitary obligation to control the distribution of water, and in terms of the legal prohibitions imposed on the District's discretion to change and ignore the judicial apportionment of benefits to the consumers.

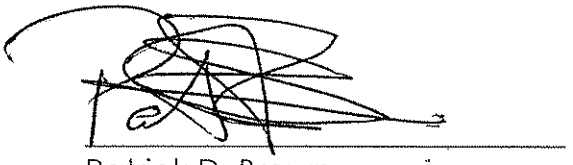
Furthermore, there is no legal split in authority to decide how to account for water lost in the riverbed. IDWR's authority is not diminished or in conflict with the District's laws of Title 43. I.C. §43-1503 specifically forbids such a conflict and legislatively mandates that this Court apply IDWR's Rule to all users of the river who convey water in it.

The outer boundaries of the District's and this Court's discretion are fixed by the 1936 decree and statute, and cannot be altered. Under I.C. §43-406 the

allotment of water to each consumer, as measured in the Reservoir, was permanently established as a benefit to each consumer. As the "trustee" of these allotments, the District must protect each for the specific consumer, not dilute them. See, *Jensen v. Boise-Kuna Irr. Dist.*, 75 Idaho 133, 141, 26 P.2d 755, 760 (1954). (Under I.C. §43-316, a district holds the water in trust for its consumers.)

Therefore, the Court is respectfully requested to reverse the decisions below to comply with the law, as described above.

DATED this 7 day of January, 2009.



Patrick D. Brown
Attorney for Plaintiffs-
Counterdefendants-Appellants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 7 day of January, 2009, (s)he served a true and correct copy of the within and foregoing document upon the following by depositing a copy thereof in the United States mail, postage prepaid, addressed to:

KENT FLETCHER
Attorney at Law
1200 Overland Ave.
P.O. Box 248
Burley ID 83318
for Defendants-Counterclaimants-Crossdefendants-Respondents BLRID, Reynolds, Huggins, Harwood, Anderson & Hintze

PHILLIP RASSIER, Deputy A.G.
322 E. Front St.
P.O. Box 83720
Boise ID 83720-0098
for Defendants-Counterclaimants-Crossdefendants-Respondents IDWR & Tuthill

Robert Harris
HOLDEN, KIDWELL, HAHN & CRAPO
1000 Riverwalk Dr., Ste. 200
P.O. Box 50130
Idaho Falls ID 83405-0130
for Intervenors-Counterclaimants-Crossclaimants-Respondents